

NOTE by Assistant, 19 Oct. This document has been reformatted only to contain all the attachments associated with this motion. XXXX, 18 Oct 2004.

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UNITED STATES

v.

SALIM AHMED HAMDAN

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) DEFENSE REQUEST FOR  
) WITNESS IN MOTION HEARING ON  
) SUBJECT-MATTER JURISDICTION:  
) ALLISON DANNER  
)  
) 18 October 2004  
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1. Witness Request – Allison Danner – U.S. v. Hamdan.
2. Allison Danner is a professor at Vanderbilt University Law School. Her address is Vanderbilt University Law School, Nashville, TN 37203-1181. Her telephone number is XXXX. Her e-mail is XXXX. She speaks English.
3. Allison Danner is a scholar whose work concentrates on conspiracy law as a violation of the laws of war. She has published extensively on these questions, and has tremendous expertise about group criminality as it concerns the International Trials for the Former Yugoslavia. She will explain why, under International Law and the laws of war, the charge against Mr. Hamdan is not properly cognizable in a military commission.
4. Civilian Defense Counsel has spoken with Professor Danner and has read her publications.
5. The testimony of Professor Danner is to be used for Mr. Hamdan's motion regarding subject-matter jurisdiction (D17). It will also be referenced in the Lack of Legislative Authority (D20) motion.
6. Civilian Defense Counsel had e-mail communication with Professor Danner on 8 October 2004, and Professor Danner indicated that she would be available to testify at Guantanamo during 10 November 2004.
7. Civilian Defense Counsel believes that the Commission would greatly benefit from the live testimony of Professor Danner. Professor Danner's expertise in the laws of war, and the ways in which the trials for the Former Yugoslavia and Nuremburg have treated group criminality, will illuminate the Military Commission's treatment of these issues tremendously. She will be in a position to provide her reaction to the arguments advanced in the proceedings by both sides as to the charge of conspiracy, and whether it is appropriately brought before this Military Commission. Further, the Defense does not agree to an alternative to live testimony as the issues are case dispositive and we cannot possibly contemplate all questions the Commission Members may have.
8. No other witness can be called to attest to notions of international law, laws-of-war conspiracy doctrine and subject-matter jurisdiction.

9. This is an expert witness request. Her views are authoritative on the questions raised in these motions. They can also serve as a ballast for the entire Commission against the influence of the sole member of the Commission who has a law degree. We do not mean to suggest that that individual is likely to rule one way or the other, rather, we simply point out that providing the Commission with access to the leading law professors with expertise in the world on the complicated legal questions that are before the Commission is essential to providing the full Commission with the information necessary to make an informed decision. In this respect, the Commission is similar to the United States Congress' calling of expert witnesses who are law professors during impeachment trials to help them understand what the law is. Without access to these witnesses, a tremendous risk exists that the Commission will not reach a full and fair judgment of law.

10. We submit no other matters for your consideration.

NEAL KATYAL  
Civilian Defense Counsel

Attachments:

1. Defense Request for Expert Witness – Allison Danner – 11 Oct 04
2. Defense Response to Prosecution Motion Barring Expert Witnesses, 14 Oct 04

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UNITED STATES

v.

SALIM AHMED HAMDAN

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) DEFENSE REQUEST FOR  
) WITNESS IN MOTION HEARING ON  
) SUBJECT-MATTER JURISDICTION:  
) ALLISON DANNER  
)  
) 11 October 2004  
)

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1. Witness Request – ALLISON DANNER – U.S. v. Hamdan.
2. Allison Danner is a professor at Vanderbilt University Law School. Her contact information is set forth on her curriculum vitae, which is attached.
3. Allison Danner is a scholar whose work concentrates on conspiracy law as a violation of the laws of war. She has published extensively on these questions, and has tremendous expertise about group criminality as it concerns the International Trials for the Former Yugoslavia. She will explain why, under International Law and the laws of war, the charge against Mr. Hamdan is not properly cognizable in a military commission. She will testify as to the use of military trials in recent history, with a particular emphasis on those in Yugoslavia and Nuremberg.
4. Civilian Defense Counsel has spoken with Professor Danner and has read her publications.
5. The testimony of Professor Danner is to be used for Mr. Hamdan's motion regarding subject-matter jurisdiction. It will also be referenced in the Separation of Powers motion.
6. Civilian Defense Counsel had e-mail communication with Professor Danner on 8 October 2004, and Professor Danner indicated that she would be available to testify at Guantanamo during 10 November 2004.
7. Civilian Defense Counsel believes that the Commission would greatly benefit from the live testimony of Professor Danner. Professor Danner's expertise in the laws of war, and the ways in which the trials for the Former Yugoslavia and Nuremberg have treated group criminality, will illuminate the Military Commission's treatment of these issues tremendously. She will be in a position to provide her reaction to the arguments advanced in the proceedings by both sides as to the charge of conspiracy, and whether it is appropriately brought before this Military Commission. Further, the Defense does not agree to an alternative to live testimony as the issues are case dispositive and we cannot possibly contemplate all questions the Commission Members may have.
8. No other witness can be called to attest to notions of international law, laws-of-war conspiracy doctrine and subject-matter jurisdiction and the recent international experience.

9. This is an expert witness request. Her views are authoritative on the questions raised in these motions. They can also serve as a ballast for the entire Commission against the influence of the sole member of the Commission who has a law degree. We do not mean to suggest that that individual is likely to rule one way or the other, rather, we simply point out that providing the Commission with access to the leading law professors with expertise in the world on the complicated legal questions that are before the Commission is essential to providing the full Commission with the information necessary to make an informed decision. In this respect, the Commission is similar to the United States Congress' calling of expert witnesses who are law professors during impeachment trials to help them understand what the law is. Without access to these witnesses, a tremendous risk exists that the Commission will not reach a full and fair judgment of law.

10. We submit no other matters for your consideration.

Neal Katyal  
Civilian Defense Counsel

Note:

The Defense also included its reply to the Prosecution Motion to Barring Expert witnesses.

A copy of that document is the same as Motions Inventory number P8 and is also an attachment to Motions Inventory D24.

The document referred to above has been removed from this file solely for purposes for economy and because it is already a part of the record.

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Assistant to the Presiding Officer.

## **D28 Hamdan - Defense Supplement to witness request - Danner. 21 Oct 04**

Please find, as per your request, a more detailed synopsis of the testimony. The synopsis also explains why live testimony is important, from the witness's perspective. I have separately, in our motion under POM #10, explained why we believe the witness' testimony is important from the perspective of the Defense, including the need to ensure that the Presiding Officer does not unduly influence the proceedings as the only lawyer. These concerns are at their height given the decision today by the appointing authority to reduce the size of the commission to three members, meaning that the spectre of undue influence by the Presiding Officer (which would, as we have said, be unintentional yet predictable) is at its height.

### Testimony of Professor Allison Danner

Synopsis. I will argue that, to my knowledge, the nature and scope of the conspiracy charge alleged against Mr. Hamdan have no precedent in the statutes or jurisprudence of the International Military Tribunal at Nuremberg (IMT), the International Military Tribunal for the Far East (IMTFE), the related post-World War II national prosecutions, the International Tribunal for the Former Yugoslavia (ICTY), the International Tribunal for Rwanda (ICTR), or the International Criminal Court. I will describe the limited use of conspiracy at the IMT, IMTFE, other military prosecutions conducted after World War II, the ICTY, and the ICTR. I will explain that joint criminal enterprise, which has been used at the ICTY, is not the equivalent of conspiracy.

Personal Knowledge and Relevance. I have knowledge of these subjects through my academic writings and teachings, which focus on the history, development, and substance of international criminal law, including the laws of war. This testimony is relevant, because the sole offense alleged against Mr. Hamdan is that of conspiracy. Furthermore, the military commission instructions state that the offenses triable in the commissions both "derive from the law of armed conflict" and are "declarative of existing law."

Military Commission Instruction No. 2 at 1-2 (Apr. 30, 2003). It is, therefore, relevant whether conspiracy, as it is alleged in the indictment against Mr. Hamdan, is declarative of existing law. Relevant precedents for this question include international military commissions, such as those held after World War II in Germany and Japan, as well as international criminal tribunals that apply the laws of war. These institutions will be the focus of my testimony. Furthermore, my testimony will respond to arguments recently offered by the United States in U.S. federal court that rely heavily on precedent from the IMT, ICTY, ICTR, and ICC in support of the conspiracy charge alleged against Mr. Hamdan.

Benefit of Testimony. My published writings, while pertaining to the substance of my testimony, do not directly address the question at issue before the Commission—namely whether precedent from international military and criminal tribunals applying the laws of war supports the conspiracy charge alleged in this case. My knowledge of the process

and substantive decisions rendered at the IMT, IMTFE, ICTY, ICTR, and ICC reflects several years of research into these institutions, based on numerous sources, including judicial decisions, articles, books, and interviews. The historical analysis I will provide will assist the Commission in its job of finding what the law is, by providing information about what the law and practice in this area has been. The testimony I can provide to the Commission based on my expertise in this area will neither be easily available to the Commission nor is captured fully in my published writings.

UNITED STATES OF AMERICA

V.

SALIM AHMED HAMDAN

PROSECUTION RESPONSE TO  
DEFENSE REQUEST FOR  
WITNESS: ALLISON DANNER

25 October 2004

The Prosecution in the above-captioned case hereby files the following response and notification of intent not to produce in accordance with paragraph 6 of POM 10. In support of this response, the Prosecution answers the Defense's Request for Witness as follows:

1. Response to paragraph 2. The Prosecution has no objections or supplements to this paragraph.
2. Response to paragraph 3. The Prosecution does not contest the content of the proffer. However, the Defense must assert why the witness' *testimony* will be relevant. Most of the motions pending before this Commission are motions on purely legal matters. It is the function of the written motion to define the law as it applies to one's case and to then supplement this written motion with oral argument that can also be responsive to any particularized questions of the finders of law. Expert witnesses are not needed for this purpose. To the extent that experts in the field have written on an issue that is the specific subject of a motion, that article can be cited and even appended to the motion. If the legal-expert has experience and understanding of the subject matter of the motion but has not written specifically on the topic, that expert can be approached as a consultant to a party and can help construct the brief and the oral argument

The Defense has clearly demonstrated the capability to argue their legal theories. There appears to be a great danger in permitting this expert testimony. The Defense in their witness request for Professor Danner stated her views are “authoritative on the questions raised in these motions.” It is clear that the Defense sees this expert serving in a quasi-judicial function, not allowed in any court of law, court-martial, or military commission. This statement alone shows the danger that this witness may usurp the authority of the Commission in determining what the law is.



Finally, while we appreciate the Defense's concern that the Commission may need further assistance in understanding the law beyond the initial arguments that the counsel assigned to this case can provide, we do not feel that using the Defense's hand-picked experts are the solution. In voir dire, the Presiding Officer stated that should questions of the Commission desire greater assistance in understanding a question of law, he would permit counsel for both sides to present their views on the matter to the Commission to assist in getting the Members the additional help they desire. (Transcript page 23). Defense stated in voir dire that the Commission members will have to carefully study "international treaties, the customs and practice as established by military regulations, handbooks, and international cases throughout the world, as well as the Constitution of the United States, federal judicial opinions and federal statutes." See Hamdan transcript, page 42. Defense asked if the members were up to the task and they replied that they were. Until such time as the members claim to be unable to determine the law despite reading of the parties' briefs, hearing the parties' oral argument, and conducting their own research, expert testimony is neither relevant nor helpful.

3. Response to paragraph 4. The Prosecution has no objections or supplements to this paragraph.
4. Response to paragraph 5. The Prosecution has no objections or supplements to this paragraph.
5. Response to paragraph 6. The Defense asserts that Professor Danner is available to testify on 10 November 2004. While we do not know the travel availability of Professor Danner, it should be noted that it is usually a several day turnaround in arriving and subsequently departing Guantanamo Bay. It will create difficulties if Professor Danner is solely available on 10 November.
6. Response to paragraph 7. To the extent that the Prosecution's response to paragraph 3 contains arguments on both relevance and the need for this witness to testify live, that response is hereby incorporated. Additionally, the Defense provides no reasons why testimony by this witness, if allowed, could not be taken by telephone or video teleconference (VTC).
7. Response to paragraph 8. The Defense states that "no other witness can be called to attest to notions of international law, laws of war conspiracy doctrine and subject matter jurisdiction . . . ." This appears internally inconsistent with the other "law" expert requests the Defense has submitted and would appear to be cumulative with the testimony of other proposed witnesses.
8. Response to paragraph 9. Paragraph 9 of the Defense request is not compliant with POM 10. POM 10, paragraph 4i requires that the Defense state the law that requires the production of this witness.
9. Conclusion. The Prosecution has a motion pending before the Commission, the decision of which would affect the production of this witness. Therefore, the Prosecution

requests that the Commission defer its ruling on this issue until the Motion is decided. If the pending Motion is decided in favor of the Defense, the Prosecution still requests that the production of this witness be denied. From the proffer, it is clear that the Defense had consulted with the witness and has obtained the value of her input. If they have not used this value in their motions to date, they can do so in their replies<sup>1</sup> or in oral argument. While live “law expert” witness testimony may add to the media attention dedicated to these proceedings, there has been no showing as to why the briefs and oral arguments of the parties assigned to this case are insufficient.

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Commander, U.S. Navy  
Prosecutor

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<sup>1</sup> On 21 October, the Defense requested a delay in filing replies to the Prosecution’s responses to their motions. They now have plenty of time to incorporate whatever they have learned from these experts into their replies.

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	)	DEFENSE REPLY TO
UNITED STATES OF AMERICA	)	PROSECUTION RESPONSE TO
	)	DEFENSE REQUEST FOR
v.	)	WITNESS: ALLISON DANNER
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SALIM AHMED HAMDAN	)	28 October 2004
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1. Reply regarding paragraph 3. The prosecution continues its blatant attempt to hide relevant law, as well as testimony about the history of the law, from the commission through this legal maneuver. The Defense has explained, in detail, precisely why the witness' *testimony* will be relevant. We have detailed precisely why this commission must hear from Professor Danner, insofar as she is one of the foremost experts on the international laws of war, and, particularly the use of the conspiracy doctrine in past military tribunals. That is the sole charge facing Mr. Hamdan. Moreover, Professor Danner has studied in detail the development of the law in the International Tribunal for the Former Yugoslavia.

As the supplemental material makes clear, Professor Danner has published work that bears on these questions, but has not applied that work to this specific prosecution. That is the function of her testimony, and for this reason, merely incorporating her past work into a defense brief of some kind would not be appropriate. Indeed, everyone would expect that a move like that would be resisted by the Prosecution precisely on grounds of relevance. And it makes absolutely no sense why testimony can be admitted in one form (like writing), but not another (live).

Incorporation of Professor Danner's work into a defense brief is inappropriate for a second reason, because she is not in any way a defense counsel. The whole function of experts about international law is precisely to make sure that the relevant conclusions can be cross examined by both sides. Barring that testimony in lieu of some submission alongside a brief would make such examination impossible.

The Prosecution provides not a *single* case in which a mixed body of lawyers and nonlawyers has *ever* rejected expert testimony about the law. The Prosecution is simply making up a legal rule by taking precedents from other institutions when the very rules of evidence that govern *this* commission are different. Even under Federal Rule 702, which governs courts where the responsibility for deciding fact and law are separated, courts

admit the testimony of professors of international law all the time. The prosecution cites irrelevancies about the *Yamashita* case and tries to make an argument about how expert testimony is not relevant. Nothing could be farther from the truth: the testimony goes to the very heart of the motions being decided by the commission. And because this commission is the trier of both fact and law under the President's Order, the testimony is not only important, it is essential. It would constitute reversible error for the commission to proceed without it.

Unable to marshal even one case to support their bizarre contention, the Prosecution must resort to mischaracterizing the defense's request, asserting that somehow an expert will "usurp the authority of the Commission" and serve "a quasi-judicial function." Nothing could be further from the truth. The function of an expert is to illuminate the law and to explain the history behind it. It is NOT to decide it. In several previous filings with this commission, we have explained that the role of an Expert is confined in this way.

The prosecution is free to cross examine an expert witness, to explain why they believe the expert is wrong, and to present witnesses of their own in compliance with commission rules. But to say that the witness must be excluded because her views will decide the matter for the commission is not only premature, it is wrong. The testimony will do nothing more than explain her view of what the law is and why it looks that way. The commission is of course free to disregard the views of the expert at any point. That is precisely why, in *voir dire*, the Defense made sure that the commission was willing to hear arguments based upon international law. The fact that the Members have agreed to be willing to hear and decide these matters militates *for* the testimony (not against it, as the Prosecution contends in its papers), because it shows both the relevance of the testimony as well as the stated capability of the Commission to decide these matters.

2. Response to paragraph 6. No logistical difficulties with the transportation and testimony of the expert witness have yet arisen. The defense will deal with them at that time if they do so arise.
3. Response to paragraph 7. The defense has explained the relevance of the testimony, as well as why live testimony is greatly needed. Without live testimony, the impact of the witness will be much diminished, and the witness' ability to react to questions posed by both sides in the motion argument will be weakened considerably. The Defense did not ask for a delay in the Proceeding to accommodate the Professor's testimony and as such did not present alternatives.
4. Response to paragraph 8. The testimony of Professor Danner is in no way cumulative with that of Professor Fletcher. Professor Danner is an expert in international law as it relates to conspiracy in war crimes trials; Professor Fletcher is an expert in the domestic law of conspiracy. The prosecution knows the difference, since it relies on, and distorts, both lines of cases.

Furthermore, the defense seeks to call the Professor as an expert in the field of international criminal law and has set out her qualifications. The appropriate test is whether the expert has the expertise sought and whether the testimony is relevant to the subject, not whether she is the only possible expert. The defense notes that the Professor is not being paid for the testimony and as such whether a suitable alternative is available is not at issue.

5. Response to paragraph 9. The Defense request easily complies with POM 10. The defense has cited numerous cases where expert testimony has been admitted and been found helpful in helping the legal institution decide what the law is and why it looks the way it does. To deny it would be in violation of the President's Order, which requires a "full and fair trial."

The defense agrees that the Prosecution's motion to preclude the testimony of the defense experts, if granted by the Commission as a whole, would be dispositive on the issue. Unless and until that occurs, however, there is no reason to prevent this testimony from going forward. Indeed, the Prosecution offers no explanation of how, if the Commission's full membership were to rule against the Prosecution's motion to preclude the testimony of the experts, there would be any basis to preclude Prof. Danner's production, particularly when the standard for testimony and evidence is probative to a reasonable person.

It is notable that the Prosecution seeks to enter, on the *merits*, evidence under this very evidentiary standard that would not be admissible in any court in America. It then, under the *very same standard*, tries to bar the Defense the opportunity to enter relevant expert testimony on a *motion*. This is a wrongheaded move, one can only taint the fairness of these proceedings.

Indeed, the failure to produce Prof. Danner when the Commission as a whole has not ruled on the matter is a calculated and clear attempt to influence the Commission's decision by requiring the Commission to delay the proceedings to obtain the testimony. Given that two of the Commission members remain responsible for their normal duties during the disposition of the Commission and that proceedings may only be heard in Guantanamo, delay requires these Commission members to suffer additional disruption in their work and personal lives if they were to rule in favor of the Defense. As such production of the witness is appropriate in order not to prejudice or appear to prejudice the Commission's decision.

6. Conclusion. The testimony of this expert is essential in giving the commission a fair picture about the complexity and history behind the issues being decided by the commission. Even the Prosecution has not provided a single precedent that *prohibits* the testimony of this expert. To the contrary, similar testimony is given in federal courts all the time. Indeed, the case for such testimony is far stronger here. Given the particular nature of (a) these claims and (b) this type of proceeding (commission composed of non-lawyers) it is pragmatically advisable to let this expert testify.

Finally, the Defense insists that the full membership of the Commission rule on this matter in a written opinion with reasons. In particular, the opinion should address the following two questions in explaining why the witness will or will not be produced: Is this expert's testimony permissible under the rules of the commission? If not, how can such a decision can be squared with the permissive rules of evidence set by the President to govern these commissions and the fact that this is a mixed body to determine law and fact? It is unquestioned that the witness is an expert knowledge relevant to this commission's adjudication of matters before it.

We further request that this motion, and the government's response, as well as the final written decision by the full commission, be made public and part of the record in this case.

Neal Katyal  
Civilian Defense Counsel

LCDR Charles Swift  
Detailed Defense Counsel

From: XXXX. CIV (L)  
Sent: Friday, October 29, 2004 3:06 PM  
To: XXXX. CIV (L); 'Swift, Charles, LCDR, DoD OGC'; 'Neal Katyal'  
Cc: 'XXXX, CDR, DoD OGC'; 'Swann, Robert, COL, DoD OGC'; XXXX, LtCol, DoD OGC'; XXXX; XXXX, COL, DoD OGC'; XXXX, Cpt, DoD OGC'; XXXX; 'XXXX, GySgt, DoD OGC'; 'Gunn, Will, Col, DoD OGC'; Brownback, Peter E. COL (L)

Subject: US v. Hamdan, Decision of the Presiding Officer, D28

United States v. Hamdan  
Decision of the Presiding Officer, D28

The Presiding Officer has denied the request for production of Allison Danner as a witness. The Presiding Officer did not find that she is necessary. See Military Commission Order 1, section 5H. Accordingly, this request has been moved from the active to the inactive section of the filings inventory in accordance with POM 12. See also paragraph 8, POM 12.

By Direction of the Presiding Officer

XXXX  
Assistant to the Presiding Officers  
XXXX  
Voice: XXXX  
Fax: XXXX

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UNITED STATES OF AMERICA	)	
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	)	<b>DEFENSE MOTION -</b>
	)	<b>THE ENTIRE COMMISSION</b>
v.	)	<b>TO GRANT PRODUCTION OF</b>
	)	<b>WITNESS DENIED IN D 28</b>
	)	
HAMDAN	)	<b>ALLISON DANNER</b>
	)	

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October 29, 2004

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The Defense previously requested that the above witness be produced. As the documents referenced below make clear, this expert is a leading scholar about international war crimes tribunals, and, in particular, the doctrine of conspiracy under the laws of war. Hamdan is charged with a sole count of conspiracy; Danner is Assistant Professor of Law, Vanderbilt University Law School. The request for production of this witness was denied by the Presiding Officer under the provisions of Military Commission Order 1, section 5H.

The Defense requests the Commission direct the production of the witness, and that the Commission consider the following previously made filings, and the attachments thereto, per the Filings Inventory, in making its determination.

- a. Motion by the defense for the production of the above witness.
- b. Decision of the Presiding Officer denying the witness.
- c. The government response to this motion.
- d. The government reply to this motion.

The defense also renews its statement that this motion must be decided by the full commission, as per Section 4 (c)(2) of President Bush's Military Order dated 13 November 2001, and that the reasons for granting or denying the motion be specified in detail and in writing on the record.

By: \_\_\_\_\_  
 Neal Katyal  
 Civilian Defense Counsel